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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LUIS VALERIO et al., Defendants and Appellants.	H026460 (Monterey County Super. Ct. No. SS021094)

Sixteen-year-old Sureño gang member defendant Luis Valerio and 17-year-old Sureño defendant Eric Alvarado were tried as adults by a jury that found them guilty of seven counts of attempted first degree murder with gang, gun use, and great bodily injury enhancements on each count and one count of street terrorism. The charges arose from a Sureño/Norteño "shootout" on March 11, 2002, in Salinas in which one of the participants and an eight-year-old bystander were struck by gunfire. Defendants received a life term with a 40-year minimum in state prison. They appeal on numerous grounds including constitutional error in admitting evidence, instructing the jury, and in denial of confrontation and cross-examination.

FACTS

Daniel M., a 14-year-old Norteño gang associate, who was involved in the March 11 shootout, pled guilty to attempted murder and agreed to testify for the prosecution. At trial, he explained that Norteños wear the color red and identify

themselves with the Roman numeral XIV. Sureños wear the color blue and identify themselves with the Roman numeral XIII. Defendants were Sureños.[1]

Prior to March 11, there had been a conflict between Jose Solorio and Daniel Salazar (Donut). Donut and his brother Eduardo had seen Solorio spraying "187 Donut"

[1]

NORTEÑOS	SUREÑOS or MEXICAN PRIDE LOCOS (MPL), an emerging Sureño gang with younger members	NONCOMBATANTS
1. Daniel M., prosecution witness	1. Luis Valerio, defendant, "Blackie"	1. Fernando C., 5th grader and shooting victim
2. Jose Solorio, "J.P."	2. Eric Alvarado, defendant, MPL, "Speedy"	2. Alicia C., Fernando's mother
3. Andrew Mendoza	3. Daniel Salazar, "Donut"	3. Carlos, Fernando's friend and shooting witness
4. Michael (also referred to as "Miguel" in testimony) Trujillo, owner of white pit bull dog	4. Guillermo Virgen (denied gang membership but friend of Sureños and a codefendant of Valerio's and Alvarado's but not involved in this appeal)	4. Jesus (same)
5. Mario Trujillo, Michael's brother	5. Eduardo Salazar, MPL, brother of Daniel Salazar (Donut)	5. Carlos (same)
6. Joel M., Daniel's brother	6. George Constantino, MPL, friend of Valerio	6. Raymond (same)
	7. "Tiny," the person to whom Valerio gave a firearm	7. Benito, Luis's brother
		8. Daniel, Luis's brother
		9. Angel, Benito's friend

Identifications and nicknames were sometimes unclear, for example, Daniel M. referred to a person by the name of "Eric" or "Speedy." On direct examination, he identified Valerio as this person, even though Valerio's first name is Luis and he was later identified with the nickname "Blackie." Defendant Alvarado was known as "Speedy."

on a wall. Penal Code section 187[2] defines the crime of murder and Donut and Eduardo understood the graffiti as a threat to Donut.

On March 11, Norteños Daniel M., Mendoza, and Solorio were walking along the street at an apartment complex, when defendants approached them. Daniel M. confronted defendants because he had been drinking and wanted to beat up Alvarado. Words were exchanged and Alvarado pulled a revolver and pointed it at Daniel M. Daniel M. "guess[ed]" that the trigger was pulled. However, no shot was discharged and Alvarado said in Spanish that he did not have any bullets.

The Norteños "[t]ook off running" to Daniel M.'s house. Daniel M. gave a double barreled 20-gauge shotgun to Solorio, enlisted the aid of Michael Trujillo, and the four Norteños returned to the apartment complex. They flashed gang signals at defendants and defendants ran away. While the four Norteños were chasing defendants, a gunshot was heard. Daniel M. and Trujillo left. Solorio also left but returned shortly thereafter with both the 20-gauge shotgun and a single-barreled, sawed-off 12-gauge shotgun.

The Norteños went to a nearby bike path which had a creek on one side and houses on the other. The group included Daniel M., Solorio, Mendoza, Trujillo, with his pit bull dog, and Trujillo's brother Mario. As they walked down the path they saw a white car in which Donut was a passenger. The Norteños stared in a hostile manner at the Sureños in the white car, but Solorio, the only one armed, did not display his shotgun during this confrontation.

After the white car drove away, the Norteños continued along the path. Daniel M. saw a group of Sureños ahead of them and the two groups exchanged gang signs. Then one of the Sureños fired five or six shots toward them and Daniel M. "hit the floor." Solorio also went to the ground, but then got on his knees and returned fire with his

[2] Further statutory references are to the Penal Code unless otherwise stated.

shotgun. Daniel M. was certain the Sureños fired the initial shots. The Norteños ran toward them and saw that an eight-year-old child, Fernando, had been shot.

A few days after the shooting, police searched Donut's house and found a CD which had the word "Vagos," the name of a Sureño street gang, on it. Two blue handkerchiefs also symbolized association with the Sureños, as well as a CD player with gang writing on it. Numerous items had the word "sur," short for Sureños, written on them, as well as the Roman numeral XIII.

Police also searched Norteño prosecution witness Daniel M.'s house. They found a red bandanna and a notebook with XIV written on it, a telephone cradle upon which was written "187 Scraps." The word "Scraps" had an "x" through it. Daniel M. testified that "Scraps" was a derogatory term for Sureños. Daniel M. had wanted revenge on Alvarado for pointing the gun at him, and he had given Solorio a 20-gauge shotgun knowing that Solorio hated Donut.

After the confrontation, codefendant Virgen had what appeared to be a "through and through" bullet wound in his leg, namely, the bullet entered one side of the leg and exited through the other side. Virgen said the Norteños shot him because they believed he was with the Sureños. Virgen stated there had been an earlier hostile confrontation between the two groups, and he thought there might be a shooting. Virgen heard shots coming from his group.

Donut's brother Eduardo pled guilty to two counts of assault with a deadly weapon and testified for the prosecution. Eduardo was a member of the Mexican Pride Locos (MPL), a Sureño street gang. Eduardo was familiar with Solorio, Valerio, and Alvarado.

Fernando C. testified that on the day he was shot, he and his friends had been gathering paint balls from the creek running along the bike path. As he and his friends were walking home, he saw a group of people with a white dog (the Norteños). Fearing the dog, Fernando and his friends turned around and walked away from the people with

the dog. While walking away, the boys encountered another group of people (the Sureños). One of the Sureños pushed Fernando away, pointed to the people with the dog, and said, "They're over there." As Fernando ran away, he saw two of the Sureños take out guns and start shooting toward the Norteños. Although Fernando and his friends "were running as fast as [they] could," a bullet struck Fernando in the back. Fernando did not recognize either Alvarado or Valerio as the people whom he had seen on the bike path.

Fernando's mother, Alicia C., testified that when she arrived at the hospital, she saw Fernando in "a bed with his clothes full of blood." After four hours of surgery, doctors told Mrs. C. that it was more dangerous to try to remove the bullet than to leave it inside Fernando. After the surgery, Fernando spent 11 days in the intensive care unit. When he returned home, he suffered frequent pain, and went to the emergency room about once a month. Fernando's grades suffered, and he refused to sleep in his own bedroom.

Fernando's friend Carlos was with Fernando when he was shot. Before the shooting started, one of the Sureños told Carlos and Fernando to run away. Carlos saw one of the Sureños pull out a rifle and start shooting at the people with the dog. The Sureños shot first, and the other group returned fire. Carlos believed he heard about eight gunshots as he and Fernando ran away. Fernando was struggling because of the weight of the paint balls he carried. Then Carlos heard Fernando scream that "he didn't want to die." Carlos began crying and told Fernando that he would call police and an ambulance. The Norteños started chasing the Sureños who had started running away.

Salinas Police Officer Mark Lazzarini testified as a gang expert. He explained that Sureños were affiliated with the Southern California-based Mexican Mafia prison gang and the Norteños were affiliated with the Northern California-based Nuestra Familia prison gang. The MPL was a Sureño street gang. Because the Norteños and Sureños did

not have strict geographic boundaries, rival gang members could live in close proximity to each other.

Lazzarini testified that Virgen told him he was "there to back up the other Sureños [be]cause he knew that there was going to be a confrontation and . . . the other Sureños with him were armed with weapons." According to gang practice, all gang members were required to "back up" fellow gang members in any confrontation with rival gang members. Valerio told Lazzarini that he associated with Sureño gang members, including members of the MPL. Valerio had ongoing problems with Norteños who considered him a Sureño. At first, Valerio denied being at the confrontation, but then admitted being there. Valerio knew there was going to be "some type of conflict" with the Norteños. He neither admitted nor denied being armed. He later stated during the interview, however, that he had given his weapon to a friend he called "Tiny." Valerio then told Lazzarini that everything he had just said was false, that the Sureños had not had any weapons, and that the Norteños had come up behind them and started shooting.

Lazzarini opined that Valerio was a Sureño gang member. According to Salinas police department records, Valerio had been caught trespassing on school grounds with admitted Sureño gang members, including Alvarado. Alvarado was an admitted member of the Sureño MPL gang. Valerio was also found in a stolen car wearing blue, a color associated with Sureños. Gang members typically used stolen cars as transportation while committing crimes. Lazzarini believed Valerio's crimes were gang-related because of his association with other gang members, his weapons possession, and his attack on Norteños. Lazzarini believed Valerio's participation in the crimes was intended to benefit the Sureños. Such an assault enhanced the Sureños' reputation with other gang members and instilled fear in the community, making it less likely that citizens would report crimes committed by Sureños.

Lazzarini opined that codefendant Alvarado was a Sureño gang member because he had twice been stopped by police in the company of admitted Sureño gang members.

He also had been found trespassing with Valerio and other admitted gang members. In addition, the circumstances of the attempted murders, Alvarado's weapons possession, and his effort to battle Norteños suggested that the confrontation was gang-related and was intended to benefit the Sureños. Lazzarini acknowledged that the graffiti stating "187 Donut" was a threat. He also acknowledged that on March 30, 2001, when Alvarado was found in the company of two admitted Sureño gang members, there was no evidence that Alvarado admitted being a Sureño during that incident.

Defendants stood trial on a 15-count information charging each of them with seven counts of first degree attempted murder (§§ 664, 187), seven counts of assault with a shotgun (§ 245, subd. (a)(2)), and one count of street terrorism (§ 186.22, subd. (a)). The information also included premeditation allegations (§ 664, subd. (a)), gang allegations (§ 186.22, subd. (b)), gun use allegations (§ 12022.5, subd. (a)), gun discharge allegations (§ 12022.53, subd. (c)), gun discharge causing great bodily injury allegations (§ 12022.53, subd. (d)), and great bodily injury allegations (§ 12022.7, subd. (a)). There were two separate great bodily injury allegations based on different victims as to count 11. The jury found Valerio and Alvarado guilty of attempted murder on all seven counts of street terrorism, and found all the allegations true. As stated above, they received a life term with a minimum of 40 years. These appeals ensued.

ISSUES ON APPEAL

Valerio claims (1) he is not guilty of the premeditated and deliberate attempted murder of Fernando because "the theory of his guilt stated in the prosecution's jury argument and in the trial court's instructions, does not exist in our law." First, the transferred intent doctrine does not support the theory of liability of the instructions and Valerio cannot be guilty of the attempted murder of Fernando on a vicarious aiding and abetting doctrine because Solorio was not his accomplice; second, Solorio's act of shooting Fernando when he was aiming at Valerio or Alvarado was not in furtherance of Valerio's or Alvarado's common criminal design; third, the provocative act doctrine does

not support the theory of the instructions; fourth, there is no substantial evidence of attempted murder of Fernando; and fifth, no new theory of liability for count 1 may be retroactively applied to his case. (2) The trial court erred in instructing the jury with CALJIC No. 8.66.1 on concurrent intent. (3) The trial court erred in admitting codefendant Virgen's pretrial statements. (4) The judgment must be modified to reflect a minimum term of 36 years and three months; and (5) the judgment must be modified to strike the section 12022.53, subdivision (d) findings on counts 3, 5, 7, 9, 11, and 13.

Alvarado claims (1) there was insufficient evidence to support a section 12022.53, subdivision (d) finding; (2) the section 12022.53 allegations were improperly amended six days before trial because no evidence supporting the allegations was adduced at preliminary hearing; (3) admission of evidence that Alvarado had prior contacts with the police violated the Sixth Amendment; (4) the sentence constitutes cruel and unusual punishment; and (5) the trial court abused its discretion in refusing to sentence Alvarado under the juvenile court law.

ATTEMPTED MURDER OF FERNANDO

Valerio contends that he is not and cannot be guilty of the attempted murder of Fernando because he cannot be considered an aider and abetter of Solorio, a member of the rival Norteño gang, whose bullet struck Fernando, and because there is no substantial evidence that he, Valerio, intended to kill Fernando.[3] Valerio argues that the prosecution

[3] Valerio also asserts that the transferred intent and provocative act doctrines do not apply to attempted murder. The People concede Valerio is correct because attempted murder requires a specific intent to kill and cannot be based upon implied malice. "The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice—a conscious disregard for life—suffices. [Citation.] But over a century ago, we made clear that implied malice cannot support a conviction of an *attempt* to commit murder. ' "To constitute murder, the guilty person need not intend to take life; but to constitute an attempt to murder, he must so intend." [Citation.] "The wrong-doer must specifically contemplate taking life; and though his act is such as, were it successful, would be (continued)

had to prove that "some defendant intended to kill him. [Citations.] If no one attempted to murder [Fernando], there is no attempted murder of him as to which any other defendant's vicarious aiding and abetting liability might attach." (Underscoring original.) The People assert that Valerio's attempted murder conviction was properly based on an aiding and abetting theory because although Valerio did not fire the bullet that hit Fernando, Valerio was liable for Fernando's attempted murder as an aider and abettor on a natural and probable consequences theory.

The jury was instructed that attempted murder required proof of an ineffectual act toward killing, done with a specific intent to kill. (CALJIC Nos. 8.66, 8.60, 8.11; *People v. Iniguez* (2002) 96 Cal.App.4th 75, 79.) The court also instructed: "A cause of the injury to Fernando is an act that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act, the injury to Fernando, and without which the injury to Fernando would not occur." (CALJIC No. 3.40.) "There may be more than one cause of the injury to Fernando. When the conduct of two or more persons contributes concurrently as a cause of the injury, the conduct of each is a cause of the injury, if that conduct was also a substantial factor contributing to the result. A result is concurrent if it was operative at the moment of the injury and acted with another cause to produce the injury to Fernando. [¶] If you find that the defendant's conduct was a cause of injury to another person, then it is no defense that the conduct of some other person contributed to the injury." (CALJIC No. 3.41.) "In order to find the defendant guilty of the crimes of Attempted Murder . . . as charged in Count 1 . . . , you must be satisfied beyond a reasonable doubt that: [¶] 1. The crime or crimes of [section] 415[, subdivision] (a), Challenging A Fight, [section] 415[, subdivision] (a)(2), Brandishing A

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murder, if in truth he does not mean to kill, he does not become guilty of an attempt to commit murder.' " (*People v. Bland* (2002) 28 Cal.4th 313, 327-328, 331; see also *People v. White* (1995) 35 Cal.App.4th 758, 768.)

Firearm, [section] 240, Assault, or [section] 186.22[, subdivision] (a), Gang Activity were committed; [¶] 2. That the co-defendant aided and abetted those crimes; [¶] 3. That a co-principal in that crime committed the crimes of Attempted Murder . . . ; and [¶] 4. The crime[s] of Attempted Murder . . . were a natural and probable consequence of the commission of the crime[s] listed in paragraph 1, specifically, [section] 415, or [section] 417[, subdivision] (a)(2) or [section] 240, or [section] 186.22[, subdivision] (a)." (CALJIC No. 3.02.)

"Under California law, a person who aids and abets the commission of a crime is a 'principal' in the crime, and thus shares the guilt of the actual perpetrator." (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.) "[A]n aider and abettor is a person who, 'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' " (*Ibid*.) Under the natural and probable consequences doctrine, an aider and abettor is liable not only for the specific crimes intended, but also for any crime that was reasonably foreseeable. (*Id*. at p. 262.) Although an aider and abettor "shares the guilt of the actual perpetrator" (*id*. at p. 259), the mental state necessary for conviction as an aider and abettor is that of intending to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.)

In the gang shootout case of *People v. Sanchez* (2001) 26 Cal.4th 834 (*Sanchez*), Sanchez and Gonzalez, two rival gang members, participated in a gun battle which caused the death of Estrada, an innocent bystander. Although it could not be determined whose bullet actually struck the victim, the defendants' murder convictions rested on two alternative theories of murder liability: premeditated murder (§ 189) and murder perpetrated by means of intentionally discharging a firearm from a motor vehicle with the specific intent to inflict death. (§ 189; *Sanchez*, *supra*, 26 Cal.4th at p. 851.) Although it

could not be determined which defendant fired the fatal bullet, sufficient evidence established that defendant and Gonzalez premeditated the murder of one another, and that the unlawful conduct of each was a substantial concurrent, and hence proximate, cause of Estrada's death, both could be convicted of the first degree murder of Estrada by operation of the doctrine of transferred intent. (*Sanchez*, *supra*, 26 Cal.4th at pp. 851-852.) With respect to the aiding and abetting theory, the court stated that that concept does not apply only to criminal enterprises among friends, but also encompasses situations where rivals mutually engage each other in combat. Thus, as an example cited by the *Sanchez* court, two individuals who were drag racing each other could be held jointly liable for the death of a victim struck by only one of the participants. (*Id*. at p. 846.) " ' "There may be more than one proximate cause of the death. When the conduct of two or more persons *contributes concurrently as the proximate cause of the death*, the conduct of each is a proximate cause of the death if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the time of the death and acted with another cause to produce the death." ' " (*Id*. at p. 847.)

In this case, by mutually engaging in combat in violation of section 417, subdivision (a)(2), and participating in gang activity in violation of section 186.22, subdivision (a), Valerio and Solorio set in motion a chain of events which led to the attempted murder of Fernando. When Valerio opened fire on the Norteños, it was foreseeable that they would return fire. Both Valerio and Solorio intended to kill each other and their confederates by shooting at any—and everyone—in proximity to them, that is, in the "kill zone." Solorio demonstrated this by returning fire in the direction of the Sureños and all those in proximity to them. (*People v. Bland*, *supra*, 28 Cal.4th at pp. 329-330 [where defendant attempts to ensure death of primary victim by harming everyone in victim's presence, defendant may be found guilty of attempting murder of all persons within the "kill zone"].) Fernando was in the "kill zone" and was hit.

Valerio was properly found guilty of the attempted murder of Fernando as a natural and probable consequence of his participation in the shootout between his gang and the Sureños as aiders and abettors of each other.

INSTRUCTIONAL ERROR

Next, Valerio complains that the trial court erred in instructing over objection pursuant to CALJIC No. 8.66.1 that "[a] person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the 'kill zone.' The intent is concurrent when the nature and scope of the attack, while directed at the primary victim, are such that it is reasonable to infer the perpetrator intended to insure harm to the primary victim by harming everyone in that victim's vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a 'kill zone' is an issue to be decided by you. [¶] This instruction applied to Counts 3, 5, 7, 9, 11, and 13."

Valerio asserts that the instruction is ambiguous and can be read to state the rule that "a person can shoot more than once at a group of persons while 'concurrently' intending to kill more than one of them," or it can be read to state that "the requisite intent to kill exists as to non-primary victims, if the defendant intends to kill the primary victim and also intends to harm 'everyone in that victim's vicinity.' " Valerio states the first reading is consistent with our law but the second is not because shooting while intending to *harm* another is not attempted murder.

In reviewing claims of instructional error, a reviewing court decides whether there is a reasonable likelihood that the jury misconstrued or misapplied the terms of the instruction. (*People v. Clair* (1992) 2 Cal.4th 629, 663.) The correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction, or from a particular instruction. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) In determining whether instructional error is prejudicial, the California Supreme Court has declared that the reviewing court may

reverse a conviction " 'only if, "after an examination of the entire cause, including the evidence" [citation], it appears "reasonably probable" the defendant would have obtained a more favorable outcome had the error not occurred.' " (*People v. Lasko* (2000) 23 Cal.4th 101, 111.)

CALJIC No. 8.66.1 is based on the holding in *People v. Bland*, *supra*, 28 Cal.4th at pages 329-330, where the court stated, "[A]lthough the intent to kill a primary target does not *transfer* to a survivor, the fact that the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what it termed the 'kill zone.' 'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to insure harm to the primary victim by harming everyone in that victim's vicinity. For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. . . . Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.' "

Like the wording quoted above, CALJIC No. 8.66.1 clearly informs the jury that it must determine "[w]hether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a 'kill zone.' " The phrases "zone of harm" and "harm to all who are in the anticipated zone" does not instruct the jury that it may convict on a finding of a lesser intent than intent to kill, they merely describe a zone in which all who are in it are imperiled. For example, if an assailant rushes into a group of people to attack the intended victim with a knife, the kill zone probably would be considerably smaller than that created by an assailant who, like Valerio, engaged in a shootout despite the group of boys running from the targets. CALJIC Nos. 8.66 and 8.66.1 explicitly required the jury to determine whether Valerio possessed the requisite intent to kill. The instructions differentiated the requisite intents needed to support the attempted

murder counts from those needed to support the assault counts. The instructions did not mislead the jury into believing that an attempt to harm rather than an intent to kill could support an attempted murder conviction.

Nevertheless, Valerio argues that the prosecutor's argument on intent to kill, the failure of his or Virgen's defense counsel to discuss the law of attempted murder, and the lack of trial evidence of any "actual path of any shot fired by [Valerio] or Alvarado, or as to where any bullet discharged by them struck," "most probably" resulted in the jurors' misunderstanding CALJIC No. 8.66.1. "First, the prosecutor's argument . . . invited the jury to read [CALJIC] No. 8.66.1 as stating a rule that shooting into a group rendered a person of [*sic*] guilty of attempted murder of each person in that group, so long as there was an intent to kill any one group member with an intent to 'harm' others. No contrary or corrective interpretation of [CALJIC] No. 8.66.1 was offered by defense counsel, and, as noted, Alvarado's counsel even invited the jury to suppose that the prosecutor [*sic*] interpretations were correct. Second, the trial evidence . . . supports two conflicting inferences as to intent to kill. That is, it supports equally reasonable inferences: one, that [Valerio] and Alvarado intended to kill each [Norteño] member but were very poor marksman [*sic*] at ranges of 40-57 feet and so failed; or two, that [Valerio] and Alvarado did not come close to hitting any Norteño member because they were not trying to kill them any one of them [*sic*], but were trying to intimidate or stampede them. . . . [¶] [T]he jurors were encouraged to read [CALJIC] No. 8.66.1 as allowing application of a kind of transferred intent rule to all the attempted murder counts, and such a reading and application fit the trial evidence. That being so, there is a reasonable likelihood, or reasonable probability, that the jurors actually so understood [CALJIC] No. 8.66.1."

We disagree. First, as we have stated, the instructions were clear that for attempted murder, the requisite intent is intent to kill. Second, in his overall remarks, the prosecutor did not mislead the jury. He explained that attempted murder required proof that "the person doing the act, committing the act harbored express malice of

aforethought [*sic*], mainly a specific intent unlawful [*sic*] against another human being. . . . That is a fancy, legal, simple instruction malice [*sic*] when there is manifested an intention to unlawfully kill a human being. How do you manifest an intent to kill another human being? Do you suppose by pulling [*sic*, pointing] a handgun at them and pulling the trigger over and over you might be [*sic*] manifesting an intent to kill? The answer is yes."

The prosecutor's later explanation of the "kill zone" concept[4] was difficult to follow but not prejudicially misleading in light of the clear instructions of the court on intent to kill, and the instruction that the jury must accept and follow the law as the court states it and that if anything concerning the law said by the attorneys conflicts with the court's instructions, the jury must follow the court's instructions. (CALJIC No. 1.00.)

Finally, notwithstanding that, as Valerio states, "testimony as to the number of shots, and who fired them, varies," and that "[t]here is no evidence that there was [*sic*] any shots or any slugs recovered or anything. Any rounds were anywhere close to anything on the Norteños' side. Absolutely nothing. Believe me if there were, you'd hear about it." Witnesses testified that shots were heard from both groups. In addition, Valerio told Officer Lazzarini that he was at the confrontation and knew there was "going

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[4] The prosecutor stated: "You were instructed that a person who intends to kill one person may also concur [*sic*] intent [*sic*] to kill other persons often risk [*sic*]—it's referred to as the kill zone intent, nature of the scope of the attack directed at a primary victim makes it reasonable to infer that the perpetrator, i.e., the defendants[,] intended to insure harm, harming everybody in the victim's vicinity. What does that mean? The point of this is when you have a whole group of people let's say you only really want to shoot Solorio because he's been writing 187 Donut on the wall and you only want to shoot Donut 'cause you didn't get him the first time because he [*sic*] didn't have any bullets. That doesn't mean you're innocent of attempted murder. That is what the law is. It's a simple content [*sic*] if you're shooting into a crowd attempting to commit murder which these defendants you [*sic*] can't claim that with respect to other people in the crowd. You didn't have that same intent if you're doing what they did in discriminantly [*sic*] shooting in a group of people."

to be some type of conflict" with the Norteños and that he had given his weapon to a friend, "Tiny." He then told Lazzarini that everything he said was false, that the Sureños had not had any weapons, and that the Norteños had come up behind them and started shooting. It was for the jury to determine the credibility of the witnesses and resolve conflicting evidence. They did so in favor of the prosecution. There was no error.

ADMISSION OF CODEFENDANT VIRGEN'S STATEMENTS

Next, Valerio contends the court violated his Sixth Amendment right to confront witnesses by admitting nontestifying codefendant Virgen's pretrial statements to Officer Lazzarini and Detective Will Williams in which he admitted to Lazzarini that "he was there to back up the other Sureños 'cause he knew that there was going to be a confrontation and . . . [knew] the other Sureños with him were armed with weapons." Virgen also said that "there was going to be a hand combat between . . . JP [Solorio] and Donut, but he knew the firearms were involved and still went with them in order to . . . back them up." Lazzarini testified Virgen "told me several times he . . . never thought of anything else but backing them up, not walking away." Detective Williams testified that Virgen said he had gone with his friends to "back them up" and that the purpose for backing a person up was to "engage in some sort of violent confrontation." Valerio's admission to Lazzarini that he knew there was going to be some type of conflict with the rival Norteños was also admitted. The court instructed the jury it could consider Virgen's statements only against him; it could not use the statements against Valerio or Alvarado.

The United States Supreme Court has held that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant [citation], the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." (*Cruz v. New York* (1987) 481 U.S. 186, 193.) However, "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when . . . the

confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." (*Richardson v. Marsh* (1987) 481 U.S. 200, 211.)

The admission of Virgen's statement did not violate Valerio's confrontation rights because Virgen's statement contained no direct or implied references to Valerio. However, even if Virgen's statement indirectly implicated Valerio by referring to "the other Sureños" and helped to support premeditation and deliberation findings against Valerio by suggesting that the violent confrontation was planned in advance, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Anderson* (1987) 43 Cal.3d 1104, 1128.) Other properly admitted evidence established that Valerio admitted he had known in advance that there was going to be a violent confrontation between the two groups; Valerio did not admit or deny that he was armed but he did admit that he had given his gun to "Tiny"; and prosecution witnesses uniformly testified that the armed confrontation between the two gangs was planned. In light of this evidence, Valerio cannot show that the jury would not have found premeditation and deliberation absent the admission of Virgen's statement. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

MINIMUM TERM

Next, Valerio claims the judgment must be modified to reflect a minimum term of 36 years and three months rather than 40 years. The trial court sentenced Valerio to a life term with a minimum term of 15 years for attempted murder (§§ 664, 187) followed by a consecutive life sentence with a minimum of 25 years for using a gun to commit the crime (§ 12022.53, subd. (d)) which, added together, equal a total minimum term of 40 years. Valerio claims that since he may earn conduct credits reducing the parole ineligibility period by up to 15 percent, the trial court should have stated the lesser minimum term.

When a trial court imposes sentence, it "has responsibility to calculate the exact number of days the defendant has been in custody 'prior to sentencing,' add applicable

good behavior credits earned pursuant to section 4019, and reflect the total in the abstract of judgment." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) It is the Department of Corrections, "not the trial court, [which] has the responsibility to calculate and apply any custody credits that have accrued between the imposition of sentence and physical delivery of the defendant to the agency. (§ 2900.5, subd. (e).) [¶] Once a person begins serving his prison sentence, he is governed by an entirely distinct and exclusive scheme for earning credits to shorten the period of incarceration." (*Id.* at p. 31.) The "statutory scheme, read as a whole, plainly contemplates that once sentenced, committed to prison, and delivered to the Director's custody, a felon remains in that status, serving a term of imprisonment, until lawfully released, and earns credits against the sentence, if at all, only pursuant to the laws specifically applicable to persons serving terms in prison." (*Id*. at p. 33.)

Valerio's abstract of judgment reflects that he was properly sentenced to a term of life with a 40-year minimum with 603 days of pretrial credits. Whatever credits he earns in prison will be calculated by the Department of Corrections, not awarded prospectively by the trial court.

SECTION 12022.53, SUBDIVISION (d) ENHANCEMENTS

Finally, Valerio claims the court may have erred by ordering sentence on six great bodily injury findings to run concurrently to the seventh for the injuries to Fernando. This issue was raised in a case now decided by our Supreme Court, but pending when Valerio filed his brief. *People v. Oates* (2004) 32 Cal.4th 1048, 1066, holds that it is proper to impose multiple concurrent sentences on section 12022.53, subdivision (d) enhancements, even where only one attempted murder victim has been injured.

SUFFICIENCY OF THE EVIDENCE OF SECTION 12022.53 ENHANCEMENTS

Alvarado claims that insufficient evidence exists to support a finding against him on the section 12022.53, subdivision (d) enhancement. He cites *People v. Garcia* (2002) 28 Cal.4th 1166, 1171, for the principle that the statute requires a "finding that a principle

[*sic*] defendant (1) personally and intentionally (2) discharged a firearm and, (3) that the discharge of this firearm proximately results in great bodily injury." (Underscoring Alvarado's.) According to him, the evidence was clear that Solorio shot Fernando and that he (Alvarado) could not have done it because Fernando was behind him.

Alvarado also claims that he cannot be liable as an aider and abettor under section 12022.53, subdivision (e)(1), because Solorio was not associated with him when Solorio shot Fernando. He relies on *People v. Atkins* (2001) 25 Cal.4th 76, 92-93, for the proposition that "[a]n aider and abettor must ' "act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." ' . . . [¶] . . . An aider and abettor must *intend* not only the act of encouraging and facilitating, but also the *additional criminal act* the perpetrator commits. [Citation.]" Alvarado claims that since he was a Sureño, and not furthering Norteño interests, he cannot be held liable for the enhancement.

However, as explained above in connection with Valerio's contention that he was not an aider and abettor of Solorio, Solorio and in this case, Alvarado, were " 'violating several laws, *the acts of both led directly to and were a proximate cause of the result*, and . . . [t]he evidence is sufficient to show that they were not acting independently of each other, and that they were jointly engaged in a series of acts which led directly to the [shooting of Fernando].' " (*Sanchez*, *supra*, 26 Cal.4th at p. 846, quoting *People v. Kemp* (1957) 150 Cal.App.2d 654, 659, italics added by the *Sanchez* court.) Alvarado personally discharged a firearm at the Norteños, intending to kill them. Solorio, a Norteño, also had a premeditated intent to kill one or more of the Sureños. The shooting of Fernando was the natural and probable consequence of Alvarado's action in shooting at Solorio and inviting Solorio's return fire. Alvarado was properly found responsible for personally and intentionally discharging a firearm causing great bodily injury to Fernando.

Finally, Alvarado objects to the application to him of section 12022.53, subdivision (e)(1)(B), which makes a person who is a principal liable for any of the enhancement provisions of section 12022.53 if "[a]ny principal in the offense committed any act specified in subdivision (b), (c), or (d)." Literally read, Alvarado says, "Alvarado could be responsible under subdivision (d) for a life term if any of the Sureño gang member [*sic*] did lesser acts of use or discharge of a firearm under subsection [*sic*] (b) and (c) of section 12022.53." Alvarado asserts that "the fact that another Defendant discharged a firearm and the additional fact that Fernando suffered great bodily injury at the hands of rival gang members should not be juxtaposed to impute [*sic*] a life term on the part of Alvarado. It simply cannot be said that Alvarado acted with the intent to aid the person who inflicted great bodily injury on Fernando. While[] Alvarado may well be vicariously liable under subdivisions (b) and (c) of section 12022.53, he simply cannot be said to have aided or abetted the actual infliction of great bodily injury" pursuant to subdivision (d), so the true findings under that subdivision should be stricken.

Section 12022.53, subdivision (e)(1), imposes vicarious liability on aiders and abettors who commit crimes in participation with a criminal street gang. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 11-12.) Under this section, the firearm enhancement could be found true on an aiding and abetting theory if the attempted murder was committed for the benefit of a criminal street gang. (*Ibid.*) In our case, there was overwhelming evidence that the attempted murders were committed for the benefit of a criminal street gang. Valerio admitted the Norteños thought he was a Sureño and he experienced ongoing problems with them. Alvarado was known to associate with admitted Sureño gang members. Prosecution witnesses Daniel M. and Eduardo Salazar gave details of the rivalry between the Norteños and Sureños. It was clear that gang rivalry sparked the shootout that led to Fernando's injuries. Since Alvarado's acts were a concurrent cause of Fernando's injury, the true finding was supported by substantial evidence. (See *Sanchez*, *supra*, 26 Cal.4th at p. 849.)

AMENDING THE INFORMATION

Next, Alvarado complains that the trial court erred in allowing the prosecution to file a second amended information six days before trial adding allegations that Alvarado violated section 12022.53, subdivision (d) (personal discharge of a firearm resulting in great bodily injury). The original complaint alleged Alvarado had violated section 12022.53, subdivision (c) (personal and intentional discharge of a firearm); he was held to answer for this enhancement after preliminary hearing and an information with the same allegation was filed. Nevertheless, Alvarado complains, without "any [preliminary hearing] evidence either in the sense of a direct act by Alvarado or in the sense that he was an aider and abettor," the prosecution was allowed to add allegations that he personally discharged a firearm resulting in great bodily injury. (§ 12022.53, subd. (d).)

Alvarado is wrong. As discussed *ante*, evidence at preliminary hearing established that the shooting was gang-related; rival gang members can be considered aiders and abettors of each other in "engag[ing] in urban warfare" (*Sanchez*, *supra*, 26 Cal.4th at p. 848, quoting *People v. Russell* (1998) 693 N.E.2d 193, 195); and the trial court did not err by allowing the prosecutor to amend the information six days before trial. (§ 1009; *People v. Winters* (1990) 221 Cal.App.3d 997, 1005 [prosecution may amend an information at any stage of the proceedings provided the amendment does not charge an offense not shown by the evidence taken at the preliminary examination].)

ALVARADO'S PRIOR CONTACTS WITH THE POLICE

Next, Alvarado complains that Lazzarini's hearsay testimony about three prior contacts Alvarado had with the police while in the presence of Sureño gang members violates the confrontation clause of the Sixth Amendment because Lazzarini, having no personal knowledge of the incidents, was allowed to testify as to the observations and conclusions of nonwitness police officers based on records maintained by the Salinas Police Department. Alvarado states this deprived him of the opportunity to cross-examine the officers on whose observations gang activity is predicated.

Alvarado's trial counsel did not object. For this reason, the People assert and we agree that the claim is waived. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1188.)

In any event, the claim is meritless. Lazzarini, testifying as an expert witness on gang matters, is allowed to state the reasons for his opinion and the matter upon which it is based unless precluded by law. (Evid. Code, § 802.) "Expert testimony may . . . be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.] Of course, any material that forms the basis of an expert's opinion testimony must be reliable. [Citation.] For 'the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion.' . . . [¶] So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. [Citations.] And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. [Citations.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618 (*Gardeley*).)

The admission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal absent an abuse of discretion. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369.) Gang experts may rely on hearsay police records in forming an opinion that defendants were gang members who committed the charged crimes for the benefit of a criminal street gang. (*Gardeley*, *supra*, 14 Cal.4th at pp. 619-620.) The reports Lazzarini considered were of the type reasonably relied upon by experts in the field. There is no evidence that they were unreliable. The trial court properly instructed the jury on expert testimony (CALJIC No. 2.80—Expert Testimony-Qualifications of Expert). Thus, the jury was advised that the expert's opinion was only as good as the

facts and reasons on which it was based, and that the jury should consider the proof of such facts in determining the value of the expert's opinion.

Alvarado, however, asserts that the United States Supreme Court's opinion in *Crawford v. Washington* (2004) 541 U.S. ___ [124 S.Ct. 1354], demonstrates that his confrontation rights were violated by the admission of Lazzarini's testimony. *Crawford* held that, " '[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.' [Citation.] Thus, out-of-court *testimonial* statements are admissible only when the witness is unavailable and there has been a prior opportunity for cross-examination of that witness." (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 172.)

Crawford limits the introduction of hearsay directly against a defendant but does not affect the type of evidence relied upon by an expert in forming his opinion. In our case, the prosecution did not offer the contents of the police reports as hearsay evidence of the truth of the matters asserted in the reports. The reports were mentioned only as a basis for Lazzarini's opinion that Alvarado was a Sureño gang member. Alvarado had the opportunity to challenge the testimony by demonstrating the underlying information was incorrect or unreliable. He did not. There was no denial of his confrontation rights.

CRUEL AND UNUSUAL PUNISHMENT

Alvarado complains that his sentence, two life terms with a mandatory 40 years before he is eligible for parole, constitutes cruel and unusual punishment because at the time of the incident he was 17; his IQ was between 70 and 79; evidence showed he qualified for special education placement; at the time of the incident he was suffering from "extreme grief, shock, and bereavement because of the death of his two friends . . . within a two-week period from an auto accident"; he was taking Wellbutrin for anxiety and suffered an overdose requiring hospitalization; and neither he nor any of his fellow gang members actually committed the act which resulted in great bodily injury to

Fernando. After this argument at sentencing, the trial court stated, "these young men, who were not newcomers to juvenile court were on wardship, made some serious decisions on that particular date. [¶] . . . [A]lthough the defendants were convicted of attempted murder, deliberate and premeditated aspect, this easily could have been a multiple murder case if those bullets . . . had hit any of the gang members. And so it's a serious, serious matter."

"To determine whether a sentence is cruel or unusual under the California Constitution as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including his or her age, prior criminality, and mental capabilities. [Citation.] If the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' [citation], so that the punishment ' " 'shocks the conscience and offends fundamental notions of human dignity' " ' [citation], the court must invalidate the sentence as unconstitutional." (*People v. Lucero* (2000) 23 Cal.4th 692, 739-740.)

Alvarado cannot meet his burden of showing that his sentence violated his Eighth Amendment rights. Alvarado associated with known Sureño gang members. His pointing of an unloaded gun at Daniel M. and pulling the trigger on the afternoon of the shootout and then announcing he had no bullets instigated the incident. The Norteños went home to arm themselves for later retaliation against Alvarado and the other Sureños. Alvarado obtained a loaded .38 revolver which he fired during the premeditated gun battle. He had no compunctions about firing a gun in a situation in which many people could have been shot. In this case, two people were injured: Virgen, not an admitted Sureño but there to "back them up," and Fernando, the eight-year-old bystander, who was an innocent victim who continued to suffer from physical and psychological pain and educational setbacks caused by his injuries well after the incident. Under these

circumstances, Alvarado's sentence was not cruel and unusual. (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1230-1231 [40-year-to-life sentence for 17-year-old gang member convicted of attempted murder not cruel and unusual punishment].)

ABUSE OF DISCRETION IN SENTENCING

Finally, Alvarado asserts the court abused its discretion in refusing to sentence him to a disposition under juvenile court law. (§ 1170.19, subd. (a)(4).) He contends that the court had discretion to sentence him as a juvenile regardless of the prosecutor's consent and that the trial court abused its discretion in failing to do so.[5]

Section 1170.19, subdivision (a)(4), provides that, for a person sentenced pursuant to section 1170.17, "[s]ubject to the knowing and intelligent consent of both the prosecution and the person being sentenced pursuant to this section, the court may order a juvenile disposition under the juvenile court law, in lieu of a sentence under this code, upon a finding that such an order would serve the best interests of justice, protection of the community, and the person being sentenced."

The People counter that discretion had nothing to do with it; Alvarado was statutorily ineligible for sentencing as a juvenile because under Welfare and Institutions Code section 1732.6, subdivision (b) (hereafter, section 1732.6), his attempted murder convictions and life sentence rendered him statutorily ineligible to be sentenced as a juvenile.

Section 1732.6, subdivision (a), states that "[n]o minor shall be committed to the Youth Authority when he or she is convicted in a criminal action for an offense described in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 of the Penal Code and is sentenced to incarceration for life, [or] an indeterminate period to life, . . ."

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[5] This issue is presently before the California Supreme Court in *People v. Thomas* (2003) 109 Cal.App.4th 1520, review granted January 29, 2003, S112228, and *People v. Chacon* (2003) 109 Cal.App.4th 1537, review granted October 1, 2003, S117879.

Attempted murder is an offense described in section 1192.7, subdivision (c)(9). In addition, section 1732.6, subdivision (b), states, "[n]o minor shall be committed to the Youth Authority when he or she is convicted in a criminal action for: [¶] . . . [¶] (3) An offense described in subdivision (b) of Section 707 [of the Welfare and Institutions Code], if the minor has attained the age of 16 years of age or older at the time of commission of the offense." Thus, Alvarado's crime and life sentence rendered him ineligible for sentencing as a juvenile. We conclude the trial court did not abuse its discretion in refusing to sentence Alvarado pursuant to the juvenile court law.

DISPOSITION

The judgments are affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.